

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MARY D.,

Plaintiff(s),

V.

CAROLYN COLVIN,

Defendant(s).

Case No. 2:24-cv-00237-NJK

ORDER

[Docket Nos. 11, 13]

This case involves judicial review of administrative action by the Commissioner of Social Security (“Commissioner”) denying Plaintiff’s application for disability insurance benefits pursuant to Title XVI of the Social Security Act. Currently before the Court is Plaintiff’s opening brief seeking remand. Docket No. 11. The Commissioner filed a responsive brief in opposition. Docket No. 13.¹ No reply was filed. The parties consented to resolution of this matter by the undersigned magistrate judge. *See* Docket Nos. 3-4.

I. STANDARDS

A. Disability Evaluation Process

The standard for determining disability is whether a social security claimant has an “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A); *see also* 42 U.S.C. § 1382c(3)(A). That determination is made by following a five-step sequential evaluation process. *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987) (citing 20 C.F.R. §§ 404.1520, 416.920). The first step addresses whether the claimant is currently engaging in substantial gainful activity. 20 C.F.R. §§

¹ A number of pin-citations in the Commissioner's briefing are wrong, both in citations to the record and to the case law. The Commissioner must be more accurate moving forward.

1 404.1520(b), 416.920(b).² The second step addresses whether the claimant has a medically
 2 determinable impairment that is severe or a combination of impairments that significantly limits
 3 basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). The third step addresses whether the
 4 claimant's impairments or combination of impairments meet or medically equal the criteria of an
 5 impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. 20 C.F.R. §§ 404.1520(d),
 6 404.1525, 404.1526, 416.920(d), 416.925, 416.926. There is then a determination of the
 7 claimant's residual functional capacity, which assesses the claimant's ability to do physical and
 8 mental work-related activities. 20 C.F.R. §§ 404.1520(e), 416.920(e). The fourth step addresses
 9 whether the claimant has the residual functional capacity to perform past relevant work. 20 C.F.R.
 10 §§ 404.1520(f), 416.920(f). The fifth step addresses whether the claimant is able to do other work
 11 considering the residual functional capacity, age, education, and work experience. 20 C.F.R. §§
 12 404.1520(g), 416.920(g).

13 **B.** Judicial Review

14 After exhausting the administrative process, a claimant may seek judicial review of a
 15 decision denying social security benefits. 42 U.S.C. § 405(g). The Court must uphold a decision
 16 denying benefits if the proper legal standard was applied and there is substantial evidence in the
 17 record as a whole to support the decision. *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005).
 18 Substantial evidence is “more than a mere scintilla,” which equates to “such relevant evidence as
 19 a reasonable mind might accept as adequate to support a conclusion.” *Biestek v. Berryhill*, 587
 20 U.S. 97, 103 (2019). “[T]he threshold for such evidentiary sufficiency is not high.” *Id.*

21 **II. BACKGROUND**

22 **A.** Procedural History

23 On January 20, 2020, Plaintiff filed an application for disability benefits with an alleged
 24 onset date of January 1, 2020. *See, e.g.*, Administrative Record (“A.R.”) 251-53. On February 9,
 25 2021, Plaintiff’s application was denied initially. A.R. 146-50. On July 28, 2021, Plaintiff’s claim
 26 was denied on reconsideration. A.R. 154-60. On August 30, 2021, Plaintiff filed a request for a
 27

28 ² The five-step process is largely the same for both Title II and Title XVI claims. For a Title II claim, however, a claimant must also meet insurance requirements. 20 C.F.R. § 404.130.

1 hearing before an administrative law judge. A.R. 163-65. On August 22, 2022, Plaintiff,
2 Plaintiff's representative, and a vocational expert appeared for a hearing before ALJ Cynthia
3 Hoover. *See* A.R. 85-104. On December 8, 2022, the ALJ issued an unfavorable decision finding
4 that Plaintiff had not been under a disability through the date of the decision. A.R. 63-84. Plaintiff
5 submitted additional records to the Appeals Council. A.R. 8-45. On December 7, 2023, the ALJ's
6 decision became the final decision of the Commissioner when the Appeals Council denied
7 Plaintiff's request for review. A.R. 1-7.

8 On February 2, 2024, Plaintiff commenced this suit for judicial review. Docket No. 1.

9 **B. The Decision Below**

10 The ALJ's decision followed the five-step sequential evaluation process set forth in 20
11 C.F.R. § 416.920. A.R. 67-78. At step one, the ALJ found that Plaintiff had not engaged in
12 substantial gainful activity since the application date. A.R. 68. At step two, the ALJ found that
13 Plaintiff has the following severe impairments: abnormality of major joints, obesity, depression,
14 anxiety, and posttraumatic stress disorder (PTSD). A.R. 68. At step three, the ALJ found that
15 Plaintiff does not have an impairment or combination of impairments that meets or medically
16 equals the severity of one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1.
17 A.R. 68-70. The ALJ found that Plaintiff has the residual functional capacity to

18 perform light work as defined in 20 CFR 416.967(b) except for the
19 following limitations. The claimant can occasionally reach
20 overhead with the left upper extremity and frequently reach in all
21 other directions with the left upper extremity. The claimant can
understand, remember, and carry out simple tasks with sufficient
concentration, persistence, and pace for such tasks. The claimant
can have occasional contact with the public, coworkers, and
supervisors.

22
23 A.R. 70-76. At step four, the ALJ found Plaintiff had no past relevant work. A.R. 76. At step
24 five, the ALJ found that jobs exist in significant numbers in the national economy that Plaintiff
25 can perform based on her age, education, work experience, and residual functional capacity. A.R.
26 76-77. In doing so, the ALJ defined Plaintiff as a younger individual aged 18-49 as of the date the
27 application was filed who had since transitioned to the age category of closely approaching
28 advanced age, with limited education. A.R. 76. The ALJ found the transferability of job skills to

1 be immaterial. A.R. 76. The ALJ considered Medical Vocational Rules, which provide a
 2 framework for finding Plaintiff not disabled, along with vocational expert testimony that an
 3 individual with the same residual functional capacity and vocational factors could perform work
 4 as a marker, cleaner, and small products assembler I. A.R. 76-77.

5 Based on all of these findings, the ALJ found Plaintiff not disabled since the date the
 6 application was filed. A.R. 77.

7 **III. ANALYSIS**

8 Plaintiff brings a single argument on appeal: that the ALJ erred in discounting her
 9 testimony of debilitating physical and mental conditions. *See* Docket No. 11 at 5-9. The
 10 Commissioner responds that the ALJ properly discounted Plaintiff's testimony as, *inter alia*, (1)
 11 inconsistent with the medical record, (2) undermined by the effectiveness of her treatments, and
 12 (3) inconsistent with her daily activities. Docket No. 13 at 4-9; *see also id.* at 9 (arguing harmless
 13 error). The Court agrees with the Commissioner.

14 The ALJ is required to engage in a two-step analysis to evaluate a claimant's testimony as
 15 to pain and other symptoms: (1) determine whether the individual presented objective medical
 16 evidence of an impairment that could reasonably be expected to produce some degree of pain or
 17 other symptoms alleged; and (2) if so, whether the intensity and persistence of those symptoms
 18 limit an individual's ability to perform work-related activities. *See* Social Security Ruling 16-3p.
 19 In the absence of evidence of malingerering, an ALJ may only reject a claimant's testimony about
 20 the severity of symptoms by giving specific, clear, and convincing reasons. *See Vasquez v. Astrue*,
 21 572 F.3d 586, 591 (9th Cir. 2009). Factors that an ALJ may consider include inconsistent daily
 22 activities, an inconsistent treatment history, and other factors concerning the claimant's functional
 23 limitations. *See* Social Security Ruling 16-3p. If an ALJ's determination to discount a claimant's
 24 testimony is supported by substantial evidence, a court should not second-guess that determination.
 25 *Chaudhry v. Astrue*, 688 F.3d 661, 672 (9th Cir. 2012).³ "Where evidence is susceptible to more
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27 ³ The regulations previously asked the ALJ to assess "credibility." Social Security Ruling
 28 96-7p. The regulations now require the ALJ to "evaluate" the claimant's statements. Social
 Security Ruling 16-3p. This change does not alter the deferential nature of the Court's review.

1 than one rational interpretation, it is the ALJ’s conclusion that must be upheld.” *Shaibi v. Berryhill*,
 2 883 F.3d 1102, 1108 (9th Cir. 2017) (quoting *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir.
 3 2005)).

4 At step two of the above analysis, the ALJ discounted Plaintiff’s testimony of disabling
 5 conditions based on a number of reasons, including that the testimony was contradicted by the
 6 medical record, undermined by the efficacy of treatment, and inconsistent with her daily activities.
 7 *See, e.g.*, A.R. 71-75. Plaintiff fails to grapple with the ALJ’s findings on these considerations on
 8 appeal and, as a result, waived any related argument. *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th
 9 Cir. 1997).⁴ Given the applicable harmless error analysis, this waiver alone dooms Plaintiff’s
 10 appeal. *See Carmickle v. Comm’r*, 533 F.3d 1155, 1162-63 (9th Cir. 2008).⁵

11 Even were the Court not to find waiver, the ALJ’s findings in discounting Plaintiff’s
 12 testimony are well supported by the medical record. With respect to ambulation, as an example,
 13 Plaintiff testified that she “can’t even walk” on her left leg at all and that she must use a walker
 14 because she “can’t walk on her own.” A.R. 96. As the ALJ explained in her decision, however,
 15 the medical record includes numerous contrary indications. *See, e.g.*, A.R. 917 (examination notes
 16 from June 7, 2022, indicating that Plaintiff was “able to walk on heels, able to walk on toes, able
 17 to do tandem gait . . .”); A.R. 1001 (examination notes from October 25, 2022, indicating that
 18 Plaintiff “is walking daily for exercise”); A.R. 1039 (examination notes from July 19, 2021,
 19 indicating that Plaintiff “is walking 30 minutes a day for exercise”). As another example, Plaintiff
 20 testified to the ALJ that she does not perform household chores given the severity of her conditions,
 21 *see A.R. 92-93; see also A.R. 283 (“I don’t do any cleaning”); A.R. 320 (rather than listing*
 22 *household chores, representing that “I don’t do anything”)*, but the medical record includes
 23

24 ⁴ At best, Plaintiff skirts the pertinent issues by conflating them with other issues. For
 25 example, Plaintiff notes the finding of effective treatment, but then conflates that issue with the
 26 ALJ’s reference to the treatment being conservative. *See Docket No. 11 at 7-8*. Plaintiff does not
 27 provide argument that the ALJ’s reliance on the efficacy of treatment was unsupported by
 28 substantial evidence or constituted legal error.

29 ⁵ The Court must question whether a sufficient basis exists for Plaintiff’s appeal and, again,
 30 admonishes counsel that he must ensure that he is complying with his Rule 11 obligations. *See*
 31 *also, e.g., Sartor v. Colvin*, 2015 WL 5980617, at *6 (D. Nev. Aug. 10, 2015).

1 indications that Plaintiff was engaged in significant household work, *see, e.g.*, A.R. 893 (Plaintiff
 2 “admits to doing a lot of household work”); A.R. 699 (Plaintiff is “taking care of household”). In
 3 addition to being supported by substantial evidence, the factors identified by the ALJ are also
 4 appropriately considered in this context. *See, e.g., Smartt v. Kijakazi*, 53 F.4th 489, 499 (9th Cir.
 5 2022) (contradiction with medical record); *Warre v. Comm’r of Soc. Sec. Admin.*, 439 F.3d 1001,
 6 1006 (9th Cir. 2006) (effective treatment); *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir.
 7 2008) (daily activities).^{6,7}

8 In short, the ALJ’s decision is supported by substantial evidence and free from legal error.

9 **IV. CONCLUSION**

10 The decision below is **AFFIRMED**. The Clerk’s Office is instructed to **ENTER FINAL**
 11 **JUDGMENT** accordingly and to **CLOSE** this case.

12 IT IS SO ORDERED.

13 Dated: January 15, 2025



14
 15 Nancy J. Koppe
 16 United States Magistrate Judge

23 ⁶ In light of the above, the Court need not opine on whether the ALJ appropriately
 24 characterized Plaintiff’s treatment as conservative because the ALJ’s decision would be affirmed
 25 regardless. *Carmickle*, 533 F.3d at 1162-63. The Court notes, however, that Plaintiff’s argument
 26 regarding injections is contradicted by case law. *See, e.g., Bartlett v. Kijakazi*, 2022 WL 2274458,
 27 at *4 (D. Nev. June 21, 2022).

28 ⁷ Plaintiff makes the conclusory assertion that the ALJ failed to identify the testimony she
 29 discounted and to tie the evidence in the record to that finding. Docket No. 11 at 6. The Court
 30 need not address issues raised in cursory fashion. *See, e.g., Independent Towers of Wash. v. Wash.*,
 31 350 F.3d 925, 929 (9th Cir. 2003). Even were the Court to consider this argument, it fails on its
 32 merits. *Cf. Magallanes v. Bowen*, 881 F.2d 747, 755 (9th Cir. 1989).